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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR - 2 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 and Part 90 of the)
Commission's Rules to Facilitate Future)
Development of Paging Systems)

WT Docket No. 96-18

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

REPLY COMMENTS OF MOBILEMEDIA COMMUNICATIONS, INC.

APR - 2 1996

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REPLY COMMENTS OF MOBILEMEDIA COMMUNICATIONS, INC.

MobileMedia Communications, Inc. ("*MobileMedia*"), the parent company of MobileMedia Paging, Inc. and Mobile Communications Corporation of America ("*MobileComm*"),^{1/} submits these reply comments on the Commission's proposals adopting area-licensing and auction rules for paging authorizations.^{2/}

^{1/} MobileMedia, MobileComm and their subsidiaries comprise the second-largest paging company in the United States, with more than four million units in service. The companies provide service in all 50 states, offering subscribers local, regional and nationwide paging and other wireless messaging services.

^{2/} *In re Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, FCC 96-52, released February 9, 1996 (Notice of Proposed Rule Making) ("*Notice*"). MobileMedia has previously filed comments in this proceeding as well as comments and reply comments concerning the interim licensing proposals of the *Notice*.

I. INTRODUCTION AND SUMMARY

The comments submitted in this proceeding make several matters quite clear: First, and foremost, the Commission's processing freeze is impairing service and causing substantial economic harm *today*. Immediate relief is imperative. Second, the majority of those commenting on the issue oppose the Commission's geographic licensing plan in general and its selection of Major Trading Areas ("*MTAs*") in particular. The comments show that *MTAs* do not accurately reflect the service areas of most paging systems. They also illustrate that there is no single geographic division that reflects current service areas through varied suggestions of what areas reflect actual service patterns. Finally, the comments universally reject the Commission's proposed contour revisions as difficult to administer and, in any event, incompatible with the system design of the existing paging network.

Setting aside the question of whether area licensing is appropriate, it is plain that *MTAs* are the wrong choice. Although many carriers, including MobileMedia, offer service nationwide and across broad regions, the fact remains that *most* paging licensees serve areas that are dwarfed by *MTAs*. Basic Trading Areas ("*BTAs*"), which by definition are markets within *MTAs*, are a closer (yet still far from accurate) match to existing service areas. Moreover, any area licensing plan must acknowledge the *de facto* area service now provided. Operators that provide service to 70% or more of the population in an area should be awarded the license for that area. Likewise, MobileMedia should be awarded exclusivity on its *de facto* nationwide 931 MHz band channels just as the Commission has suggested for Mobile Telecommunications Technologies Corp. ("*MTel*"). Similarly-situated licensees must be treated similarly.

The comments illustrate the Commission's misapprehension of key elements that contribute to the competitive, low-cost communications service now provided by paging licensees. Faced with a particularized problem in one band that can be solved with site-based auctions, the Commission has proposed a radical revision of the rules governing the entire industry. The Commission should recast its proposal to specifically address the only true licensing issue facing paging -- mutual exclusivity in the 931 MHz band -- with site-based auctions. The balance of the paging licensing plan, which has well served the public interest, should be retained.

II. THE COMMISSION MUST TREAT SIMILARLY SITUATED LICENSEES IN A SIMILAR MANNER

The Commission has proposed to afford nationwide status to MTel on 931.4375 MHz, and MTel has supported this proportion -- claiming that its circumstances are unique.^{3/} As MobileMedia has previously shown, it also operates *de facto* nationwide 931 MHz band channels^{4/} under circumstances that are, on the relevant facts, indistinguishable from those of MTel. Despite this similarity, the Commission has proposed to exempt only MTel's *de facto* nationwide channel from the auction process. The Commission offers no explanation for this disparate treatment and, as MobileMedia has previously shown, there is none. MTel and MobileMedia are clearly similarly situated in the case of their *de facto* nationwide channels. MobileMedia is licensed for nearly 1,000 transmitters on 931.8625

^{3/} See *Comments of Mtel* at 10 (filed March 18, 1996).

^{4/} See *Comments of MobileMedia* at 21-22.

MHz and nearly 800 on 931.8125 MHz, all in the top 200 markets.^{5/} MTel states that it operates approximately 700 transmitters in each of the top 200 markets. MobileMedia covers 180 of the top 200 markets on 931.8625 and 130 on 931.8125.

In an effort to suggest that it is unique,^{6/} MTel points to its relative ease in acquiring over 500 site licenses for its 931.4375 MHz channel, noting that none of such applications have been challenged.^{7/} This is a fact of no significance. Under the Commission's present framework for the 931 MHz band, the Commission staff, not the applicant, selects a frequency for use when confronted with an application; the staff has simply chosen, on an *ad hoc* basis, to award MTel numerous licenses on this same channel when granting its applications. In any case, a party's *ability* to acquire site licenses under the Commission's current scheme is irrelevant.^{8/} Rather, the question is the scope of coverage. On that point, there is no relevant distinction between MTel's *de facto* nationwide channel and those of MobileMedia. The Commission must abide by its longstanding

^{5/} See *Reply Comments of MobileMedia on Interim Licensing Proposals*, at p. 19 (filed March 11, 1996) (citing a study of the top 200 markets conducted by Arthur K. Peters Consulting Engineers).

^{6/} The Commission suggest that MTel's situation may be unique because the Commission has preempted local regulation of its *de facto* nationwide channel. *Notice* at ¶ 27 n.61. To the extent this distinction might have been relevant, it no longer exists. Substantially all such state regulation is now preempted. See 47 U.S.C. § 332(c)(3).

^{7/} *Comments of MTel* at 10 n.18. It is also important to note that a number of the authorizations awarded to MTel or 931.4395 MHz have been cancelled without construction. See, e.g., *FCC Public Notice*, Wireless Narrowband Branch Information, Report No. NCS-96-21-A (March 27, 1996).

^{8/} Even if it were, the fact is that MobileMedia has, as demonstrated in the text, achieved similar results.

obligation to "treat similarly-situated parties in a similar manner" in considering whether to exempt MTel's and MobileMedia's *de facto* nationwide channels from auctions.^{9/}

III. THE COMMENTS SHOW THE FREEZE IS CAUSING IMMEDIATE HARM TO SERVICE AND IRREPARABLE ECONOMIC INJURY TO THE INDUSTRY

Virtually all of the comments filed in this proceeding oppose the Commission's blanket freeze and urge that it be lifted immediately. Even members of Congress have expressed concern.^{10/} "Regardless of the Commission's intentions to act quickly on the underlying rulemaking, even a relatively short delay could have an adverse impact on this highly competitive industry"^{11/} As the Commission has recognized, the paging industry is competitive and, until the freeze, was rapidly growing.^{12/} Customer demands for additional capacity and service arise daily as communities grow and new concentrations of people seek service. Likewise, the impact of a freeze on purchasing and employment in such an environment is immediate. This is well-illustrated by the precipitous drop in the

^{9/} See *In the Matter of Liability of Bay Television, Inc.*, 9 FCC Rcd 3299, 3300 n.8 (1994) (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)); see also *In the Matter of Liability of Sagittarius Broadcasting Corporation, et al.*, 7 FCC Rcd 6873 (1992); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

^{10/} Letter to Reed E. Hundt from Larry Pressler (March 15, 1996).

^{11/} *Id.* at 2.

^{12/} Notice, ¶¶ 6-7. The Commission's secondary licensing proposal is not a solution that those that provide capital to the industry are likely to accept. Although construction costs for a single paging station are not staggering, the industry is so competitive that margins will not support the construction of facilities on what amount to speculation.

stock price of a publicly-traded supplier to the industry, representing a loss of \$600 million in market capitalization in a single day.^{13/} The nature and extent of the harm which the freeze is having on paging subscribers and the industry is well-documented in the record, and MobileMedia will not restate it here. The freeze should be lifted until the Commission is ready to *act* on this matter. Then, if a freeze is appropriate, it should be implemented in a manner that does not hamper service. All pending applications that can be granted should be, and existing licensees should be afforded the ability to expand coverage in response to customer demands.

IV. THE MAJORITY OF COMMENTERS OPPOSE THE COMMISSION'S MTA BASED GEOGRAPHIC LICENSING PROPOSAL

Those supporting the Commission's wide-area licensing proposal are almost universally large carriers (and their trade association). However, the majority of commenters—including small, mid-sized and large carriers—oppose the proposal.^{14/} Small operators oppose area licensing because they serve customers, not areas.^{15/} Mid-sized licensees oppose the proposal because the area licensing scheme proposed does not come

^{13/} *Letter to William F. Caton from Katherine M. Holden*, at 10 (March 19, 1996) (concerning permitted *ex parte* presentation to Rudolfo M. Baca).

^{14/} It appears that ten or less of the parties filing comments support the Commission's MTA-based geographic licensing proposal. Some *thirty* or more commenters oppose area licensing altogether, while a handful of commenters support area licensing based upon BTAs or other areas generally smaller in size than MTAs.

^{15/} *See Comments of Rule Radiophone Service, Inc.* at 10 (filed March 18, 1996) ("[W]hat these small family owned companies have poured their life savings and life's work into is an ongoing, growing, business devoted to serving the public in the locality where the business is headquartered.").

close to matching the areas they actually serve. Given the fully-developed nature of licensing, the marginal efficiencies to be gained by area licensing, for them, are far outweighed by the costs that artificially-created mutual exclusivity would impose. "[T]he market area plan ignores the fact that . . . hundreds of mature paging systems have grown strictly in response to customer demand, and thus are not confined within MTAs or other established geographic boundaries. Market area licensing would require small and medium-sized carriers to bid on any MTA into which their system extends. Otherwise, they risk not being able to expand, and even suffering degradation of service due to interference."^{16/}

Large carriers with regional systems are of a similar view. "[I]n order to win all of the MTAs which contain some portion of its regional 931 MHz system, Ameritech would have to bid not only on the Chicago, Detroit, Cleveland and other MTAs which make up the core of its system, but also on the Pittsburgh, Cincinnati, Minneapolis, Des Moines, St. Louis and Louisville MTAs. If Ameritech were to win these latter six MTAs, it would be committing itself to an expensive buildout to areas which are not part of its business plan and in which Ameritech does not have cellular infrastructure which it can use to minimize the cost of service to its customers. On the other hand, if Ameritech fails to win these

^{16/} *Comments of the Paging Coalition*, at 3-4 (filed March 18, 1996); *see also Comments of Small Business in Telecommunications* at 12-13 (filed March 18, 1996) ("[A] practical paging system might extend between Phoenix and Las Vegas. Yet, this would cross *MTA* borders, requiring a company wishing to construct such a system to bid not only for the Phoenix MTA but the Los Angeles MTA, even if that same operator had no desire to compete in the provision of paging service within Los Angeles.").

MTAs, it will be unable to incrementally expand its existing service in response to customer demand, in those areas immediately adjacent to the present coverage."^{17/}

A number of commenters (including MobileMedia) suggest that if area licensing is to be adopted for *any* of the paging services, the license areas should be based upon BTAs.^{18/} Others suggest Commerce Department Economic Areas ("BEAs").^{19/} Still others suggest county or state boundaries as most appropriate for area licensing.

Significantly, many of these commenting parties include maps or discussions showing how the area they suggest more closely matches service areas with which they are familiar.

Taken together, these comments well illustrate that *no* predefined areas accurately reflect the service areas of existing paging systems.

The comments also show a serious technical flaw in the Commission's proposal. If all paging systems are to be defined by one set of geographical areas (be they MTAs, BTAs, BEAs, states or counties), "dead zones" with no paging service in the bands at issue will inevitably result.^{20/} While it may be possible to reduce the size of these areas through the use of directional antenna systems and agreements between co-channel licensees,

^{17/} *Comments of Ameritech Mobile Services, Inc.*, at 8 (filed March 18, 1996).

^{18/} *See, e.g., Comments of Source One Wireless, Inc.* at 2 (filed March 18, 1996) ("[A]n MSA/RSA or a Basic Trading Area approach would be more equitable to the incumbent operators, many of whom are small entrepreneurs who have built up their service in metropolitan areas but may not have the capital to step up to an MTA service area.").

^{19/} *Comments of Lloyd D. Huffman-Huffman Communications*, at 2 (filed March 18, 1996); *Comments of Pass Word, Inc.*, at 7 (filed March 18, 1996) (concerning lower band CCP and PCP channels).

^{20/} *See, e.g., Comments of Comp Comm, Inc.* (filed March 18, 1996).

many "dead zones" will still exist. The current licensing system, which permits operators to serve persons rather than areas, avoids this result.

A number of those commenting point out that the Commission is authorized to use auctions solely to resolve mutually-exclusive applications for unlicensed spectrum. They also show such issues now arise only in the 931 MHz band. MobileMedia has shown in its comments that existing cases of mutual exclusivity in that band (as well as any that might arise elsewhere) can readily be resolved using site-based auctions while mutual exclusivity can be largely avoided in the future by adopting first-come, first-served processing values.^{21/} In any case, the Commission cannot use artificially-created mutual exclusivity to justify auctions for the entire paging service. Rather, the Commission should reject area-based licensing for paging and retain the plan that has fostered today's vibrant paging industry.

V. INTERFERENCE AND SERVICE CONTOURS SHOULD NOT BE ALTERED

As numerous commenting parties point out, the Commission's proposed revisions to interference and service contours will, by themselves, cause substantial disruption to existing service. Indeed, many incumbents would be forced to bid for and win the service area surrounding their current operations *simply to maintain existing service*.

^{21/} See *Comments of MobileMedia*, at 13-14 (filed March 18, 1996).

Issues under Section 316 of the Act aside,^{22/} this simply is not good policy for paging in particular or the communications industry in general.

Incumbent licensees carefully planned and constructed their existing networks that combine coverage area from tens or hundreds of individual sites. Specifically, these networks were designed according to the present service and interference contours with sites, equipment and operating parameters designed to match the current technical rules. Entrepreneurs and lenders funded construction of the facilities with the reasonable expectation that existing service would be preserved. Now, the Commission's reduced interference contours would create "holes" within these networks that incumbents could not fill without the purchase of a wide-area license.^{23/} As one commenting party notes, "[a]bsent compelling reasons to change [the contour] rules, the Commission should not modify them, particularly where doing so would substantially impair the investments that paging licensees have made in their systems in reliance upon those rules."^{24/} Creating precedent to the contrary will hurt not only paging, but all industries that the Commission regulates.

^{22/} A number of those filing comments note that the proposed contour rules amount to an unlawful modification of their existing licenses. See, e.g. *Comments of Paging Network, Inc.* at 18 (March 18, 1996) (claiming that the Commission's proposed modifications of the service and interference contours amount to an "unlawful taking" of property interests for which it lacks authority).

^{23/} See, e.g., Letter from Jerome K. Blask, on behalf of ProNet, Inc., to William F. Caton Re: *Ex Parte Communication*, March 12, 1996 (containing a system map detailing the composite interference contours of a 931 MHz system under the present and proposed contours, depicting the significant "holes" within an existing system which the Commission's proposal would cause).

^{24/} *Comments of Metrocall, Inc.* at 10 (filed March 18, 1996).

At bottom, the Commission sets forth no sustainable basis for its contour proposal. Indeed, as one commenter has noted, the Commission's proposal is based upon an inappropriate study, the conclusions of which are inapplicable to the paging industry.^{25/} Paging systems now offer service well beyond the distances protected under the proposed rules.^{26/} Moreover, by proposing rules that effectively "recapture" some of this area, the Commission exceeds its auction authority, which expressly precludes the use of auctions for renewal or modification of existing authorizations.^{27/} If the existing contour rules are changed at all, the changes must fully protect existing service.

VI. THE COMMISSION SHOULD USE BTAs IF IT ADOPTS A GEOGRAPHIC LICENSING SCHEME

Numerous parties, including MobileMedia, have commented that the Commission's proposal to use MTAs as the basis for geographic licensing is inconsistent

^{25/} See *Comments of Ameritech Mobile Services* at 3 ("The new standard, which is derived from the Okumura 900 MHz propagation curves, is based upon a study which focused on two-way operations rather than paging Moreover, the Okumura curves are based on a mobile receive antenna height of 1.5 meters (i.e., 4.92 feet) above ground . . . this antenna height would require customers to carry their pagers on their shoulders or head, a faulty assumption.")

^{26/} See *Comments of Paging Network, Inc.* at 15 (filed March 18, 1996). ("[P]aging facilities provided reliable service well outside of the service contour calculated by the formula.").

^{27/} See 47 U.S.C. § 309(j)(1) (stating that the Commission's general authority to use competitive bidding applies only in the case of an "initial license or construction permit."); see also H.R. Rep. No. 103-11 at 253 ("Competitive bidding would not be permitted to be used for unlicensed uses; in situations where there is only one application for license, or in the case of for [sic] a renewal or modification of license.").

with actual service.^{28/} Although MobileMedia continues to believe that there is no "one size fits all" licensing area applicable to paging (and therefore questions the premise of area licensing), it agrees with the many commenters that suggest BTAs or smaller areas if geographic licensing is adopted. On balance, as more than one party observes, "[i]t is the BTAs that 'best mirror' the size and development of existing paging systems, not MTAs."^{29/}

A. MTA Based Licensing Will Eliminate Opportunities for Small Business

Paging is a unique communications industry in that it provides opportunities to small businesses, for small paging operations need not be capital-intensive.^{30/} An MTA-based scheme would destroy such opportunities, excluding small businesses from the industry they helped create and in which they still play a major part; "the large size and expense of bidding for the license and then constructing the system will effectively eliminate small business from the field if the area, as in [one commenting party's] case, extends over 150,000 square miles."^{31/} Indeed, the trend among recent PCS licensees to partition their wide-area licenses may be "an indication that an MTA may be too large a coverage area, even for larger companies with more resources."^{32/}

^{28/} See *supra*, part IV.

^{29/} *Id.* at 7.

^{30/} See *Comments of MobileMedia* at 17-19.

^{31/} *Comments of Huffman Communications* at 3.

^{32/} *Comments of Source One Wireless* at 3.

It is the near-universal view of smaller paging operators that the Commission's proposals will exclude them from competing effectively in the industry. As one commenting party states, "it is not sound spectrum to force licensees to construct state-wide paging systems, if business plans, capital constraints and customer needs do not warrant such systems."^{33/} Even the advantages proposed for small businesses, such as bidding credits and flexible provisions regarding payments of winning bids, "do not go far enough" to ensure participation of small businesses in the Commission's proposed scheme.^{34/}

B. The Claimed Potential to Limit Application Mill Scams Does Not Warrant MTA Based Licensing

The Federal Trade Commission ("*FTC*") has filed comments supporting the FCC's auction and geographic licensing proposals, viewing them as a solution to various application mill scams.^{35/} Generating and filing applications is easy; participating in auctions is not, reasons the FTC. Moreover, selecting wide areas limits the number of authorizations available and, as a result, limits the opportunity for fraud. Plainly, thwarting abusive marketing schemes is an important goal, but it should not be the basis for adopting a wide-area licensing scheme.

To achieve the FTC's worthy goals of reducing the opportunities for scams, the Commission should instead adopt the FTC's recommendations regarding strict competitive bidding rules, such as those "that require a bidder to disclose its business

^{33/} *Comments of A+ Network* at 15-16 (filed March 18, 1996).

^{34/} *See Comments of Diamond Page Partnerships, America One and Affiliated Entities* (filed March 18, 1996).

^{35/} *See Comments of Federal Trade Commission* at 9 (filed March 18, 1996).

classification, to post upfront payments, and to post a down payment in short order."^{36/} The FTC itself admits that it offers no views "from the standpoint of telecommunications policy."^{37/} It would be more appropriate for the Commission to follow the recommendations of the FTC in developing the appropriate rules for proper competitive bidding procedures rather than to follow the agency's recommendations as to the appropriate sizes for geographic licenses.

VII. IF AREA LICENSING IS ADOPTED, THE COMMISSION SHOULD GRANT AREA LICENSES TO THOSE OPERATORS THAT NOW PROVIDE SERVICE TO SUBSTANTIALLY ALL OF SUCH NEWLY-DEFINED AREAS

Many commenters, including MobileMedia, have argued that if area licensing is adopted, the Commission should develop criteria by which existing operators extensively serving the newly-defined licensed areas could receive licenses for such areas without an auction.^{38/} Paging channels are already crowded; whatever sized regions the Commission chooses if it adopts a geographic licensing scheme, numerous areas will inevitably include paging systems whose operations already provide service to a majority of the persons within

^{36/} See *id.* at 12.

^{37/} *Id.*

^{38/} See *Comments of MobileMedia* at 21. MobileMedia proposed that incumbents providing service to 70% or more of the population of an area on a frequency be awarded an exclusive right to construct on that frequency. See also *Comments of PCIA* (filed March 18, 1996); *Comments of AirTouch Paging* at 40-43 (filed March 18, 1996) (recommending a rule whereby an incumbent may certify within a brief "filing window" that over seventy percent of the population of the licensed area is encompassed within applicable service area contours of operating station locations. Absent a successful challenge to such certification, the incumbent would receive the market-area license.)

the newly-created regions. There is no reason to auction that capacity.^{39/} It is, from a *service* standpoint, valueless to anyone but the incumbent. Auction of such areas will yield only anti-competitive mischief. For instance, a successful bidder's acquisition of such a "crowded" area license would likely be only a device to hamper the existing operator's ability to build out its system; the geographic licensee could thereby extract a large payment from such incumbent operator for the regional license.^{40/} The Commission should adopt MobileMedia's proposal (or one of the similar proposals advanced by other commenters) to thwart such results.

VIII. CONCLUSION

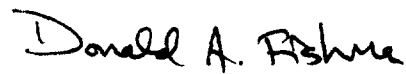
The comments are universal in their opposition to the interim processing freeze. They show harm both to those that rely on paging service and to the industry and employees that provide it. The vast majority of those commenting on the issue oppose area licensing for paging. These comments illustrate the wide variety and unique character of existing paging service areas. The record shows that there is, in fact, no single area definition that is a match.

^{39/} See *Comments of Metrocall* at 8 ("[I]t would make little sense to make available for auction any frequency in any MTA (or other geographic area) where an incumbent on that frequency is providing such substantial service that any other bidder would be unable to meet whatever coverage benchmarks the Commission ultimately adopts.").

^{40/} See *Comments of Pass Word* at 5 ("An incumbent who loses at auction and needs to expand its system will be forced to deal with the geographic licensee overlaying the incumbent's service area.").

MobileMedia strongly opposes the Commission's area licensing proposal. However, if the Commission is to proceed with area licensing, it should do so only in a manner that assures the continuation of existing service. The license areas must, to the extent possible, reflect actual service areas and MobileMedia, along with others, believes that BTAs are the best compromise. Moreover, existing coverage patterns must be protected (which the Commission's proposal fails to do) and, to avoid abusive bidding behavior and assure continued growth of service, the rules should award area licenses to operators now authorized to provide service to 70% or more of a license area's population. Finally, the Commission must treat similarly-situated entities, such as MobileMedia and MTel, similarly in awarding *de facto* nationwide channels an exemption from facing auctions.

Respectfully submitted,



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